Office - Supreme Court, U.S.
FILED
APR 11 1985
ALEXANDER L. STEVAS
CLERK

84-1190

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PATRICK J. WELLS,

Petitioner,

—against—

DAVID ROCKEFELLER, LAURANCE ROCKEFELLER, ROCK-RESORTS, INC., FOUNTAIN VALLEY CORPORATION and ESTATE FOUNTAIN RIVER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

ROBERT C. MYERS
Counsel for Respondents
140 Broadway
New York, New York 10005
(212) 820-1100

Of Counsel:

JONATHAN W. MILLER
Dewey, Ballantine, Bushby,
Palmer & Wood
TODD H. NEWMAN
Nichols & Newman

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the United States Court of Appeals for the Third Circuit (Hunter, Weis and Rosenn, JJ., presiding) correctly determine that certain of petitioner's claims were time-barred when they unanimously concluded that the period of limitations for a civil conspiracy under Virgin Islands law runs from each overt act causing damage?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	iii
Table of Authorities	iv
Brief in Opposition	1
Statement of the Case	1
Proceedings Below	7
Reasons for Denying the Writ	8
Conclusion	12

TABLE OF AUTHORITIES

Cases Cited: PAGE

Ammlung v. City of Chester, 494 F.2d 811 (3d Cir. 1974) 10

Auld v. Mobay Chemical Co., 300 F. Supp. 138 (W.D. Pa. 1969) 10

Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984) 11

Crummer Co. v. DuPont, 223 F.2d 238 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955) 11

Dovberg v. Dow Chemical Co., 195 F. Supp. 337 (E.D. Pa. 1961) 10

Fountain Valley Corp. v. Wells, 98 F.R.D. 679 (D.V.I. 1983) .....*passim*

Furness, Withy & Co. v. Yang Tsze Ins. Ass'n, 242 U.S. 430 (1917)..... 11

Hernandez Jiminez v. Calero Toledo, 576 F.2d 402 (1st Cir. 1978) 11

Lawrence v. Acree, 665 F.2d 1314 (D.C. Cir. 1981) 11

Park-In Theatres, Inc. v. Paramount-Richards Theatres, Inc., 90 F. Supp 727 (D. Del.), *aff'd* 185 F.2d 407 (3d Cir. 1950), *cert. denied*, 341 U.S. 950 (1951) 10

Phoenix Canada Oil Co. v. Texaco, Inc., 560 F. Supp. 1372 (D. Del. 1983) 10

Rutkin v. Reinfeld, 229 F.2d 248 (2d Cir.), *cert. denied*, 352 U.S. 844 (1956) 11

Safeguard Mutual Insurance Co. v. Miller, 477 F. Supp. 299 (E.D. Pa. 1979) 10

Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978) 9

Wells v. Rockefeller, 97 F.R.D. 42 (D.V.I. 1983).....*passim*

PAGE

Wells v. Rockefeller, 728 F.2d 209 (3d Cir. 1984) ..... *passim*

White v. Bloom, 621 F.2d 276 (8th Cir.), *cert. denied*, 449 U.S. 995 (1980) 9

Williamson v. Columbia Bus and Electric Corp., 186 F.2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) 10

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1972) 10

Statutes and Rules Cited:

Fed. R. Civ. P. 13(a) 7, 11

Sup. Ct. R. 17 10

Sup. Ct. R. 22.5 11

Sup. Ct. R. 28.1 1

Sup. Ct. R. 49.2 11

1 V.I. Code § 4 9

5 V.I. Code § 31(5)(A) 9

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

No. 84-1190

PATRICK J. WELLS,

Petitioner,

—against—

DAVID ROCKEFELLER, LAURANCE ROCKEFELLER, ROCKRESORTS, INC., FOUNTAIN VALLEY CORPORATION, and ESTATE FOUNTAIN RIVER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Respondents David Rockefeller, Laurance Rockefeller, Rockresorts, Inc. ("Rockresorts"), Fountain Valley Corporation ("FVC") and Estate Fountain River Company ("EFRC") submit this Brief in Opposition to Patrick J. Well's Petition for a Writ of Certiorari.[1]

STATEMENT OF THE CASE

This action arises out of the parties' relationship with respect to a 64-acre parcel of property on the island of St. Croix, on

1 Neither FVC nor Rockresorts has any parent companies, subsidiaries or affiliates to be listed in accordance with Sup. Ct. R. 28.1 other than the named respondents.

which petitioner operated a nursery for trees and plants pursuant to a written lease he executed with FVC on April 1, 1968 and which expired on March 31, 1980. FVC is a corporation which owned the property that was the subject of the lease; EFRC is a partnership which owns all the stock of FVC; David and Laurance Rockefeller are the sole partners of EFRC; and Rockresorts is a corporation solely owned by Laurance Rockefeller which operated and managed FVC's property. 728 F.2d at 211; 97 F.R.D. at 43; Rec. at 45a and SA30-SA50.[2]

The history of the parties' relationship is briefly set forth in the opinion of the Court of Appeals for the Third Circuit. As explained in the accompanying letter from respondents' counsel to the Honorable Alexander L. Stevas, however, petitioner altered the copy of that opinion which he included in the appendix to his petition. Because this falsification lends facial support to otherwise unsupported statements in the petition,[3] and in order to correct other inaccuracies in the petition, respondents' statement of the case is somewhat more detailed than it otherwise would have been and includes references to the correct opinions of both the Court of Appeals and the District Court and to the record on appeal.

In 1962, David and Laurance Rockefeller formed EFRC to purchase approximately 4,085 acres of undeveloped land in and around the area of Fountain Valley on St. Croix in the U.S. Virgin Islands. Their intent was to construct and develop a first-class resort golf course on the property. Arrangements were made with an architect to produce the necessary plans and specifications for the golf course, and petitioner was awarded a

---

2 References are to the published opinions of the Court of Appeals for the Third Circuit, *Wells v. Rockefeller*, 728 F.2d 209 (3d Cir. 1984), and the District Court of the Virgin Islands, *Wells v. Rockefeller*, 97 F.R.D. 42 (D.V.I. 1983), and to the record on appeal ("Rec.") to the Court of Appeals.

3 The statement of the case set forth in the petition for a writ of certiorari contains no reference whatsoever to the record in this case. Indeed, the factual assertions which are set forth on pages 3-5 of the petition are largely without support.

subcontract for the grading, grassing and landscaping work. On completion of the golf course in the mid-1960s, petitioner was paid in full for his work. 728 F.2d at 211; 97 F.R.D. at 43; Rec. at 43a.

During the years the golf course was under construction, long range plans were formulated for a large scale development on the Fountain Valley property, which included, among other proposals, subdividing the property and constructing individual homes and a hotel.[4] 728 F.2d at 211; 97 F.R.D. at 43; Rec. at 43a.

At that time, it was apparent to respondents that if the decision was made to proceed with development of the entire 4,085 acres along the lines then being considered, some provision would have to be made for acquiring suitable trees and plant material for landscaping purposes. As petitioner was already on the island and at Fountain Valley to landscape the golf course and was then importing plant material from his Florida operations, discussions were held with him concerning the feasibility of establishing an on-island nursery operation. Out of those discussions, which took place over several years, developed the idea of petitioner conducting a nursery operation at Fountain Valley. EFRC had the land and the capital, and petitioner stated that he had the expertise and existing off-island operations from which to draw. 728 F.2d at 211; Rec. at 43a-44a.

During the period 1965 to 1968, on an informal basis, EFRC provided petitioner with the use of the 64-acre parcel to plant nursery stock, and David and Laurance Rockefeller provided petitioner with loans totaling $78,000. Discussions were had about formalizing the relationship, and for tax purposes a joint venture was considered. Rec. at 44a-45a.

---

4 Ultimately, however, these proposals never got beyond the planning stage and respondents never developed the Fountain Valley property, although the golf course was completed. Rec. at 43a.

Ultimately, and for a variety of reasons, primary among which was that petitioner was unable to obtain a tax abatement from the government for the nursery, the joint venture was never implemented. No written agreement purporting to create a joint venture in the 64-acre parcel was ever entered into. Instead, EFRC formed a corporation (FVC) which would own approximately 2,000 acres of the Fountain Valley property (the golf course, beach area and other commercial facilities). FVC then leased the 64-acre parcel to petitioner. Petitioner and FVC agreed upon a percentage lease for a twelve-year term in combination with repayment of the $78,000 loan. On April 1, 1968, the written 12-year lease drawn along those lines was executed. 728 F.2d at 211; 97 F.R.D.at 43; Rec. at 45a, SA30-SA50.

Soon after the lease was executed, however, petitioner's nursery operation began to deteriorate. Economic conditions began to change in St. Croix and sales fell off. The nursery stock generally was considered overpriced by those organizations which did business with petitioner and its quality became increasingly less than satisfactory. Petitioner made rental payments through April 1969—although rarely on time—and then stopped making them altogether. By mid-1972, overdue rentals amounted to approximately $40,000 and activity at the nursery had fallen to practically zero. At that point, petitioner was reminded of his obligations under the lease and was informed he was in default. As respondents had no immediate plans for the Fo ntain Valley property, no attempt was made at that time to require petitioner to pay the outstanding debt or to enforce the default provisions of the lease. In mid-1977, no rent having been paid since 1969, petitioner and FVC agreed to settle the outstanding debt by executing a written partial surrender of the lease, which released portions of the nursery property, and the trees and plant material on it, to FVC. In exchange, the overdue rentals were credited to petitioner's account and all future base rentals for the remainder of his lease were waived. 728 F.2d at 211; Rec. at 45a-46a, SA51-SA53.

In the fall of 1979 and with the lease about to expire on March 31, 1980, petitioner advised representatives of Rockresorts that he would need an extension of his lease in order to clear trees and plant material from the property and to move his business elsewhere. He made no attempt, however, in the remaining months prior to the expiration of the lease to clear any of the property. Although under the terms of the lease the trees and plants became the property of FVC when the lease expired, FVC nevertheless gave petitioner an additional 90 days after expiration of the lease to remove any nursery stock. After the extension period had passed and following fruitless attempts to get petitioner to vacate the property, FVC served petitioner with a formal "notice to quit" but, in accord with his wishes, granted him an additional six-month grace period to clear trees and plant material from the premises. 728 F.2d at 211; Rec. at 46a-47a.

By the end of the additional six-month extension, petitioner had still made no effort to clear the property. At no time during the course of the parties relationship did petitioner ever claim any interest in, or right to remain on, the property after expiration of the lease. Rec. at 46a-47a.

When it became evident that petitioner would not voluntarily quit the property, FVC turned to the district court for relief, and, on December 28, 1981, commenced an action to evict petitioner. 728 F.2d at 211; 97 F.R.D. at 43; Rec. at SA8-SA10.

Repeated attempts to serve petitioner with the complaint at a variety of locations were unsuccessful. He was clearly aware of the pendency of the action, however. On January 9, 1982, petitioner's attorney[5] wrote Laurance Rockefeller complaining of FVC's actions and stating that he had conducted "a thorough investigation and careful analysis" of the matter and was preparing a suit on petitioner's behalf. On February 18, 1982, the district court found that petitioner was a proper party who

---

5 At all times during the proceedings below (both at the district court and on appeal to the Court of Appeals), petitioner was represented by counsel.

could not with due diligence be found and ordered service by substituted means. 728 F.2d at 212; 97 F.R.D. at 43; Rec. at SA4-SA5, SA11-SA12.

Pursuant to the district court's order, copies of the order and the original summons and complaint were duly published and mailed to petitioner at his Florida address on February 25, 1982. On July 19, 1982, petitioner was again served by mail, return receipt requested, at his Florida address with copies of the order and the original summons and complaint. There was no dispute that petitioner was served with the court's order, the summons and the complaint. 728 F.2d at 212; 97 F.R.D. at 43; Rec. at SA5, SA13.

On August 19, 1982, FVC moved for entry of judgment by default against petitioner. Notice of the motion was sent to and received by petitioner. After another month had passed without an appearance or any response by petitioner, on September 29, 1982, the district court entered a judgment of default against petitioner and ordered restitution of the property to FVC. *See Fountain Valley Corp. v. Wells*, 98 F.R.D. 679 (D.V.I. 1983). 728 F.2d at 212; 97 F.R.D. at 43.

At no time during the pendency of FVC's action did petitioner respond, appear or in any way attempt to raise any of the claims he later attempted to assert against respondents in this action. An examination of the complaint petitioner subsequently filed in this action reveals why: recognizing that the time for asserting all of his claims had long ago run, he attempted to use the default judgment in *Fountain Valley Corp. v. Wells* as a basis for a non-time-barred claim of wrongful eviction, which, when coupled with the conspiracy claim he was also asserting, would allow him to argue that the statute of limitations did not bar any of his other claims. 728 F.2d at 212-213; 97 F.R.D. at 43.

PROCEEDINGS BELOW

After petitioner received notice of FVC's motion for entry of a default judgment in *Fountain Valley Corp. v. Wells*, he commenced a separate action—this action—against respondents. He alleged that respondents had defrauded him in 1968 when they deprived him of a joint venture interest in the nursery by coercing him into signing a lease and claimed that respondents' actions in seeking to have the district court eject him from the property gave rise to a claim for wrongful eviction.

Respondents moved for summary judgment and dismissal in *Wells v. Rockefeller* on the grounds that petitioner's claims were compulsory counterclaims in *Fountain Valley Corp. v. Wells* and were thus barred under Rule 13(a) of the Federal Rules of Civil Procedure and the doctrine of *res judicata*. On March 2, 1983, the district court (O'Brien J., presiding) granted FVC's motion, without prejudice to petitioner's right to reopen the default judgment.[6] *Wells v. Rockefeller*, 97 F.R.D. 42 (D.V.I. 1983).

Petitioner then moved to set aside the default in *Fountain Valley Corp. v. Wells* and to interpose counterclaims identical to those asserted in *Wells v. Rockefeller*. On July 22, 1983, the district court denied petitioner's motion to set aside the default, finding that the default was willful and culpable, and

---

6 The summons had stated incorrectly that petitioner had three rather than 30 days to respond. Because of that circumstance, the district court's dismissal below was entered without prejudice to an application by petitioner to reopen the default—so petitioner would have the opportunity to have the court determine whether the mistake in the summons caused him to default (97 F.R.D. at 46). In ruling on petitioner's subsequent motion to set aside the prior default judgment, the district court found that the mistake in the summons was not related to petitioner's default, but rather that petitioner had intentionally and willfully chosen to default to further his own claims. 98 F.R.D. at 686-8.

that the proffered defenses and counterclaims were without merit. In making this latter finding, Judge O'Brien found that petitioner's affirmative claims were barred by the statute of limitations and by the statute of frauds, and that his execution in 1977 of the partial surrender was a waiver of his claim that the lease was invalid. *Fountain Valley Corp. v. Wells*, 98 F.R.D. 679 (D.V.I.1983).

Petitioner appealed both decisions to the Court of Appeals for the Third Circuit which, *sua sponte*, consolidated them for disposition. 728 F.2d at 211.

The Court of Appeals affirmed the district court's refusal to open the default judgment, specifically concurring with the district court's finding that the default was a calculated litigation tactic of petitioner and his counsel. 728 F.2d at 214. The Court of Appeals did not, however, find it necessary to review the district court's holding that the default judgment had precluded petitioner's claims, since it held that substantially all of those claims were time-barred. 728 F.2d at 215. The Court of Appeals also did not consider the district court's findings that the statute of frauds precluded proof of the alleged oral joint venture agreement and that petitioner had ratified the lease in 1977 by his execution of the partial surrender. *See Fountain Valley Corp. v. Wells*, 98 F.R.D. at 683, 684 n.13.

REASONS FOR DENYING THE WRIT

This petition for a writ of certiorari is frivolous; it involves nothing more than a question of local law of the Virgin Islands—specifically, the appropriate construction to be given to a Virgin Islands statute of limitations where a civil conspiracy is alleged. As the opinion of the Court of Appeals makes clear, that court was only "determining the controlling rule of decision for the Virgin Islands." 728 F.2d at 217. Contrary to petitioner's suggestion, there is no "split of authority" on the application of the Virgin Islands statute of limitations and, therefore, no reason for this Court to exercise its power of review.

The issue below was one of first impression in the Virgin Islands—the construction of 5 V.I. Code § 31(5)(A) (the two-year statute of limitations for torts) where a civil conspiracy is alleged. The question addressed was whether the courts of the Virgin Islands should apply the limitations period from each overt act causing damage or from the last overt act alleged. As the Court of Appeals noted, the issue had not been addressed by statute, any provision of the Restatement or any court of the Virgin Islands.

Under the law of the Virgin Islands, the method for determining the appropriate rule of decision in such a case is provided for by statute. Section 4 of Title 1 of the Virgin Islands Code, upon which the Court of Appeals relied, provides:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

In holding that the limitations period in the Virgin Islands for a civil conspiracy commences with each overt act causing damage, the Court of Appeals was merely determining the local common law rule of decision in the courts of the Virgin Islands. Its ruling does not conflict with the decision of any other circuit or any federal or territorial court. Indeed, it is the only decision which has ever construed 5 V.I. Code § 31(5)(A) in the context of a civil conspiracy allegation. The mere fact that other courts have determined other jurisdictions to have different local rules,[7] presents no "special or important reasons" that should lead this Court to exercise its discretion and undertake to review the unanimous decision of the court below

---

7 *See, e.g., White v. Bloom*, 621 F.2d 276, 281 (8th Cir.), *cert. denied*, 449 U.S. 995 (1980) (Missouri law); *Slavin v. Curry*, 574 F.2d 1256, 1261 (5th Cir. 1978) (Texas law).

concerning a local law of the Virgin Islands. *See* Sup. Ct. R. 17.

The decision below involved no error on the part of the Court of Appeals in the resolution of any federal policy or state law question; nor did it depart from the accepted usual course of judicial proceedings. *See* Sup. Ct. Rule 17. In declining to adopt a rule for the Virgin Islands which would in essence allow a civil litigant to assert a 14-year old fraud claim, the Court of Appeals properly recognized a rule which provides greater certainty as to when a particular claim arises. As the Court of Appeals correctly pointed out, the rule urged by petitioner would breed litigation by inviting an artful pleader to resurrect time-barred claims simply by alleging they were part of an on-going conspiracy. The potential for abuse and the impact on the already crowded dockets of the federal courts are obvious.

Nor did the Court of Appeals make any mistake in construing the Virgin Islands statute of limitations. Its conclusion was not only consistent with the rule generally adopted in the Third Circuit,[8] but also by this Court in construing federal statutes of limitations. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1972) ("In the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by the act of the defendants a cause of action accrues to him to recover the damages caused by that

---

8 *See Ammlung v. City of Chester*, 494 F.2d 811, 814-15 (3d Cir. 1974) (Pennsylvania law); *Williamson v. Columbia Gas and Electric Corp.*, 186 F.2d 464, 469 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 560 F. Supp. 1372, 1388-89 (D. Del. 1983) (Delaware law); *Safeguard Mutual Insurance Co. v. Miller*, 477 F. Supp. 299, 308 (E.D. Pa. 1979); *Park-In Theatres, Inc. v. Paramount-Richards Theatres, Inc.*, 90 F. Supp. 727, 729 (D. Del.) (Delaware law), *aff'd* 185 F.2d 407 (3d Cir. 1950), *cert. denied*, 341 U.S. 950 (1951); *Auld v. Mobay Chemical Co.*, 300 F. Supp. 138, 142 (W.D. Pa. 1969); *Dovberg v. Dow Chemical Co.*, 195 F. Supp. 337, 342-43 (E.D. Pa. 1961).

act and that, as to those damages, the statute of limitations arises from the commission of the act.")[9]

Moreover, the result below is amply justified on grounds not reached by the Court of Appeals. The district court correctly held that petitioner's claims were barred by the statute of frauds and could only have been proved by inadmissible parol evidence, and that his execution of a partial surrender of the lease in 1977 ratified his 1968 action. 98 F.R.D. at 654. Likewise, the district court was correct that its eviction order in *Fountain Valley Corp. v. Wells* was in no sense "wrongful" or an overt act in any "conspiracy"; it was intentionally procured by petitioner and caused him no damage cognizable at law. 728 F.2d at 214. The district court also correctly held that petitioner's claims that he was entitled to enforce a purported oral joint venture agreement and set aside a lease entered into in 1968 were barred by Rule 13(a) of the Federal Rules of Civil Procedure and principles of *res judicata* because those claims should have been interposed in FVC's action for eviction. 97 F.R.D. at 44.

Finally, as set forth in the accompanying letter of respondents' counsel to the Honorable Alexander L. Stevas, the writ should be denied because of petitioner's attempted fraud on this Court by altering the opinions below, Sup. Ct. R. 22.5; *Furness, Withy & Co. v. Yang Tsze Ins. Assn.*, 242 U.S. 430, 434 (1917). Petitioner's conduct is contemptuous and an obstruction of justice. At a minimum, damages (including all costs and attorneys' fees) should be awarded to respondents, Sup. Ct. R. 49.2, and this Court should direct that the remaining count of petitioner's complaint be dismissed.

---

9 Similarly, the decision of the court below is in accord with the rule in other circuits in construing federal statutes of limitations. *See, e.g., Compton v. Ide*, 732 F.2d 1429, 1432-33 (9th Cir. 1984); *Lawrence v. Acree*, 665 F.2d 1319, 1324 (D.C. Cir. 1981); *Hernandez Jiminez v. Calero Toledo*, 576 F.2d 402, 404 (1st Cir. 1978); *Rutkin v. Reinfeld*, 229 F.2d 248, 252 (2d Cir.), *cert. denied*, 352 U.S. 844 (1956); *Crummer Co. v. DuPont*, 223 F.2d 238, 247 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955).

CONCLUSION

For the reasons set forth above, respondents respectfully request this Court to deny the petition for writ of certiorari and impose appropriate sanctions on petitioner.

April 11, 1985

Respectfully submitted,

ROBERT C. MYERS
Counsel for Respondents
140 Broadway
New York, New York 10005
(212) 820-1100

Of Counsel:

JONATHAN W. MILLER
Dewey, Ballantine, Bushby,
Palmer & Wood
TODD H. NEWMAN
Nichols & Newman

CERTIFICATE OF SERVICE

I am a member of the Bar of the Supreme Court of the United States and certify that on April 11, 1985, pursuant to Rule 28.3 of the Rules of this Court, three copies of this Brief in Opposition were mailed, first-class postage prepaid, to Patrick J. Wells, 102 Riverview Gardens, 1000 S.E. 4th Street, Ft. Lauderdale, Florida 33301. I further certify that all parties required to be served have been served.

/s/JONATHAN W. MILLER

JONATHAN W. MILLER
140 Broadway
New York, New York 10005